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Nos. 10-238 and 10-239

IN THE

Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, et al.,
Petitioners,

v.

KEN BENNETT, et al.,
Respondents.

JOHN McCOMISH, et al.,
Petitioners,

v.

KEN BENNETT, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* FORMER ELECTED OFFICIALS IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* FORMER GOVERNORS, SENATORS, AND REPRESENTATIVES IN SUPPORT OF RESPONDENTS

Amici respectfully submit this brief in support of the respondents defending the judgment of the Court of Appeals ("Respondents").[1]

STATEMENT OF INTEREST

Amici are former elected officials from both political parties who have extensive experience with the realities of electoral politics.

Bruce Babbitt is a former Governor of Arizona, a former Secretary of the Interior, and a former candidate for President of the United States.

Bill Bradley is a former United States Senator from New Jersey and a former candidate for President of the United States.

Amory Houghton is a former United States Representative from New York.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, Petitioners and Respondents have each filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs.

Nancy Landon Kassebaum is a former United States Senator from Kansas.

Bob Kerrey is a former Governor of Nebraska, a former United States Senator from Nebraska, and a former candidate for President of the United States.

Madeleine Kunin is a former Governor of Vermont, a former Deputy Secretary of Education, and a former Ambassador to Switzerland.

Connie Morella is a former United States Representative from Maryland and a former Ambassador to the Organization for Economic Cooperation and Development.

Sam Nunn is a former United States Senator from Georgia.

John Edward Porter is a former United States Representative from Illinois.

Larry Pressler is a former United States Senator from South Dakota and a former United States Representative from South Dakota.

Warren Rudman is a former United States Senator from New Hampshire.

Alan Simpson is a former United States Senator from Wyoming.

Christie Todd Whitman is a former Governor of New Jersey and a former Administrator of the Environmental Protection Agency.

Timothy Wirth is a former United States Senator from Colorado and a former Undersecretary of State for Global Affairs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Consideration of this case should proceed from recognition of a simple point: the law at issue in this case is not, in the words of the First Amendment, a law "abridging the freedom of speech." Rather, it adds voices to the political forum and thereby expands speech. It is Petitioners – in complaining that these additional voices are a burden on their message – who in reality are seeking to restrict speech.

If there is one fixed star in the constitutional firmament, it is that arguments seeking to compel a reduction in speech face an extraordinary hurdle. This Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), has been celebrated and criticized as enabling corporate speech in the political arena, but its clear message is that arguments for shutting down speech are constitutionally suspect. Absent the gravest justification, demands to limit or eliminate speech have no constitutional force.

Petitioners attempt to portray Arizona's law as a restriction on speech, when in fact it is their position that would have a restrictive effect on political discourse. They challenge a regime that silences no one, prohibits no speech, and only enables additional speech. To make their counterintuitive point that Arizona's law is nonetheless constitutionally defective, Petitioners must argue that, because the Arizona law enables *more* speech, it somehow has impermissibly interfered with their ability to speak as much as they want on any subject they choose. This objection depends on a premise that this Court

in many ways and contexts has firmly rejected. Petitioners' argument depends on the premise that the speech of others who disagree with them somehow interferes with, silences, swamps, or unfairly competes with, their speech. But, except where a speaker quite literally shouts down another, this Court has always rejected the notion that more speech somehow interferes with, silences, swamps, or unfairly competes with speech it opposes. It is up to the listener to decide to whom he wants to attend, to decide when he has heard enough from one speaker, to decide when one speaker is so insistent, verbose, or annoying that he no longer chooses to listen to him. That is not a choice for government to make, or for courts to compel.

Never has this "drown out" form of argument been more eloquently rejected than by Judge Easterbook, whose opinion in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), was affirmed by this Court. In that case, a municipality championed a thesis, urged by Professor Catharine MacKinnon, that certain speech demeaning to women so deterred, so discouraged them from speaking that the offensive speech – though not obscene – could be prohibited *in the name of free speech itself*. Judge Easterbrook rejected that argument. Such screening, he said, must be left to the listeners alone, and the danger that they may be overwhelmed by too many messages or messages too strident or crafty is a danger that government has no power to address by prohibition. Yet Petitioners' claim that Arizona's scheme deters, burdens, or threatens to drown them out depends on that rejected premise.

This fundamental principle of First Amendment law – that speech is not burdened by more speech – is illustrated by cases as diverse as *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). In quite different contexts, the Court has turned aside claims that more speech – there the government's own speech – somehow interfered with speech it neither sought to regulate nor prohibit.

In *Rust*, the Court pointed to the absurdity of barring the government from promoting democracy without granting equal time to proponents of fascism. 500 U.S. at 194. In *Johanns*, the Court ruled it entirely permissible for the government to spend government money to promote beef consumption, even though such promotion may be thought to compete with the business of pork or chicken producers, who may believe that they must increase their own promotional budgets to rebut the government's message. 544 U.S. at 561–62. In such cases, we are brought back to the fundamental premise of First Amendment jurisprudence, explicated in *Citizens United*, that listeners must be left to make their own judgments among the myriad signals that reach them – whoever the speaker, whatever its funding.

The permissibility of the Arizona law follows *a fortiori* from the teaching of cases like *Rust* or *Johanns* or *Citizens United*. In contrast to government speech cases, Arizona does not pick from among candidates because of their message – as the government favored prenatal care (in *Rust*) or beef consumption (in *Johanns*). Instead, Arizona extends public financing to any candidate who meets certain

qualifications and agrees to forego fundraising from private sources. Thus, if the government violates no one's First Amendment rights, does not silence, suppress or deter anyone's speech by speaking a contrary message in its own voice, so most assuredly it burdens no speech when it makes funds available to all comers on a viewpoint neutral basis. More speech may answer speech but it does not silence it. What effect speech has on its audience the First Amendment leaves up to the audience.

In *Citizens United*, this Court sought to promote robust protections for freedom of speech in the public square. The Arizona law at issue here serves exactly the same purpose and is entirely consistent with *Citizens United*.

Petitioners' contrary arguments must fail for two reasons. First, Arizona's Citizen's Clean Elections Act *expands* rather than restricts speech. Following this Court's landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), various states enacted laws providing for public financing of political campaigns as an appropriate measure to promote public political discourse. In response to a long and well-documented history of political corruption, Arizona has done the same. The matching funds provision is a permissible effort to ensure that the public financing option is viable.

Arizona's law is in harmony with this Court's long line of cases approving governmental promotion of speech. As this Court made clear in *Rust*, a government may promote certain speech, and does not violate the First Amendment by placing conditions on

its funding. Consistent with that principle, the Court later held in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), that the mere fact that the government might subsidize some speakers and not others does not violate the rights of those who do not receive such funding. These cases, and many others, draw a clear distinction between government restriction and government promotion of speech. Arizona's law clearly promotes speech – and it does so without reference to content or viewpoint, unlike the case in *Rust* and *Finley*. If those who saw themselves as competitors had no free speech claim in those cases, all the more they have none where the government's funding scheme is by contrast completely viewpoint neutral.

Second, none of the theories invoked by petitioners turns the promotion of speech at issue in this case into a burden on other speakers. Petitioners maintain that *Davis v. FEC*, 554 U.S. 724 (2008), compels invalidation of the Arizona law. But *Davis* concerned a different kind of law, one that imposed asymmetrical campaign contribution limits on candidates. The result of this disparate treatment was that opponents of self-financed candidates could raise three times the money of their opponents from individual donors; it was this "discriminatory" feature of the law that made it an impermissible "penalty" on speech. Arizona's law does no such thing. It finances, rather than limits, campaign speech, and it thus promotes, rather than burdens, First Amendment values.

Petitioners, relying on this Court's decisions in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), and *Miami Herald*

Publishing Co. v. Tornillo, 418 U.S. 241 (1974), contend that Arizona impermissibly burdens their speech by forcing them to subsidize speech by their competitors. But these precedents are entirely inapposite. Petitioners are not, as were PG&E and the Miami Herald, forced to subsidize unwanted messages by lending their own facilities to transmit messages offensive to them. Nor is there the slightest risk – as there was in those cases – that an audience might attribute opposing points of view to the supposedly burdened speaker.

Petitioners argue that Arizona's law "chills" their speech because candidates will self-censor to avoid triggering funding of their opponents. But this Court's "chilling" cases have traditionally been concerned that the threat of government regulation would suppress particular points of view – not that a speaker should be shielded from speech. Here, the "risk" from speaking is more speech – not censorship. Just as there is no "heckler's veto" of the speech of another, so too there should be no "speaker's veto" of the speech of another.

Because the Arizona law permissibly expands speech and thereby furthers First Amendment values, Petitioners' request that this Court invalidate the law is unavailing.

ARGUMENT

I. Arizona's Law Expands Free Speech.

Arizona's matching funds provision is not a restriction on speech. It is a permissible funding program that promotes speech. This Court has long

recognized the distinction between government subsidies of speech and government restrictions on speech. *See Finley*, 524 U.S. 569; *Rust*, 500 U.S. 173; *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983); *see also The Supreme Court, 2007 Term—Leading Cases: Freedom of Speech and Expression—Campaign Finance Regulation: Davis v. FEC*, 122 Harv. L. Rev. 375, 383-84 (2008) (discussing Supreme Court cases upholding various government promotions of speech).

Public financing of political campaigns has long been upheld as an appropriate measure to promote public discourse. In *Buckley*, the Court upheld public financing of presidential campaigns. In doing so, the Court found that the federal public financing system for voluntary participants was a "congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to self-governing people." 424 U.S. at 92–93. This objective serves the very purpose of the First Amendment – to secure the "widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 49 (internal quotation marks and citations omitted).

Arizona's public financing and matching-funds provisions further precisely this goal. By providing a voluntary public financing system for candidates that is viable, the matching fund program aims to increase the speech in Arizona's public discourse, enriching the marketplace of ideas.

Petitioners' argument that reducing speech is constitutionally compelled must be met with appropriate skepticism. Examples of litigants arguing that speech should be reduced for an asserted laudable purpose are legion – and usually unsuccessful. For instance, in *American Booksellers*, the Seventh Circuit and this Court considered an Indianapolis ordinance drafted by Professor Catharine MacKinnon which prohibited "pornography" degrading women, even though the proscribed content did not qualify as obscenity. 771 F.2d at 329–30. The ordinance's defenders argued that its anti-discrimination and anti-subjugation goals justified the ban on otherwise permissible speech. Judge Easterbrook's unanimous opinion rejected the proffered justification for reducing speech, and this Court affirmed. Although that case involved direct viewpoint discrimination, the core principle is applicable: arguments premised on the desirability of reducing speech, as in petitioners' arguments in this case and unlike the holding in *Citizens United*, are inherently suspect.

This Court repeatedly has sustained governmental subsidies for speech in other contexts. Because the government is not required to fund *all* constitutional activities, it has the freedom to fund only *certain* constitutionally protected speech while declining to fund other protected speech. As this Court recognized in *Regan*, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." 461 U.S. at 549 (upholding a law forbidding nonprofits that engage in lobbying from receiving tax-deductible contributions because government has no obligation to subsidize all protected speech); *see also, e.g., Buckley*, 424 U.S. 1

(upholding public financing of presidential candidates who opt in to a public finance program as an appropriate government promotion of speech). Consistent with these principles, the Court held in *Rust* that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest." 500 U.S. at 193. There, Congress conditioned federal funding on the recipient's agreement not to encourage, advocate, or promote abortion. The Court upheld the restriction, declaring that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194.[2]

In similar fashion, the Court has held that, in selecting how to award funding of art projects, the government can permissibly consider "general standards of decency." *Finley*, 524 U.S. at 587. The mere fact that the government might provide funding for some art projects, and not others, did not violate the rights of artists whose projects were not deemed worthy of funding.

Numerous other cases stand for the same proposition – that the government's selective promotion of a certain activity does not inherently constitute a penalty on other activities not similarly promoted. *See, e.g., Harris v. McRae*, 448 U.S. 297, 317 n.19

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[2] Indeed, the Arizona law in this case implicates far fewer First Amendment concerns than the provision upheld in *Rust*, which conditioned federal funding on the recipient's expressed viewpoint regarding abortion. Here, the Arizona law is completely viewpoint neutral. It does not subsidize political speech based on approval or disapproval of the views expressed.

(1980) (government medical aid programs need not subsidize abortions because "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity"); *Maher v. Roe*, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) (the government need not fund private schooling, even if it funds public schooling); *see also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1924 (2006) ("The government need not subsidize the exercise of constitutional rights, even when it subsidizes other analogous behavior."). To hold otherwise would effectively prohibit the government from promoting any speech unless it promotes all speech, an entirely untenable position. The national marketplace of ideas is so vast, and embraces so many varied forms of expressive activity, that all government subsidies necessarily must be limited to something less than all speech.[5]

Arizona's law falls comfortably within this well-established precedent supporting government efforts

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[5] The government has a long tradition of promoting certain aspects of political speech, ranging from authorizing state political committees to send mass mailings at a discounted rate, *see* 39 U.S.C. § 3626(e), to establishing the franking privilege enjoyed by members of Congress since the nation's founding. *See* Act of Congress, Sep. 22, 1789, 1 Stat. 70; *see also* Act of Congress, Aug. 4, 1790, 1 Stat. 178; Act of Congress, Mar. 3, 1791, 1 Stat. 218. *See generally* Matthew Eric Glassman, Cong. Research Serv., RL34274, *Franking Privilege: Historical Development and Options for Change* (2007).

to enhance speech. In response to perceived widespread corruption in the state's political history, Arizona voters passed the Citizen's Clean Elections Act in 1998. The Act made it possible for state candidates, on a non-discriminatory basis, to finance their campaigns with money from a public fund. The matching-fund provisions, in turn, are intended to ensure that the public option is viable in practice, and not hollow or illusory. Under the Arizona statue, public funding is intended to be a genuine option, not a ball-and-chain that hobbles participation in a vigorously contested election.

The public finance option strikes at the root cause of *quid pro quo* corruption by eliminating, for all voluntary participants, the need to raise funds from private entities. It thereby also reduces the appearance of impropriety among participating candidates. In advancing these goals, the Act simply embraces the principle articulated by the Court in *Buckley*, that public financing of campaigns is a permissible "means to reform the electoral process." 424 U.S. at 90.

By selecting which speakers to fund – *i.e.*, candidates who give up private funding in exchange for participating in the public financing program – the law enacts a legitimate prerogative of the government to subsidize some speakers and not others. As such, Arizona's law uses "public funds to establish a program" promoting speech and permissibly "define[s] the limits of that program." *Rust*, 500 U.S. at 194. Indeed, unlike *Rust* and other instances of government speech that have been upheld against First Amendment challenge, the program here defines its

limits without reference to viewpoint or content of the message. Accordingly, any objection that Arizona's public financing and matching-fund provisions are impermissible because they favor some speakers over others must fail.

II. Arizona's Law Does Not Impermissibly Penalize, Burden, Chill, Or Drown Out Speech.

Petitioners advance numerous other theories in support of their argument that this Court should invalidate Arizona's longstanding law. None of their arguments are persuasive, however, and none justifies this Court's rejection of the state's law.

At the outset, it must be recognized that the injury asserted by petitioners is the provision of more speech – speech in the public square on matters of core public interest. Petitioners, of course, carry a heavy burden in arguing the counterintuitive proposition that more speech violates the First Amendment. Petitioners nevertheless argue that this Court must set aside Arizona's law for four reasons: (1) invalidation is compelled by this Court's precedent in *Davis*, 554 U.S. 724; (2) the law forces petitioners to carry the speech of their opponents; (3) the law leads to self-censorship; and (4) the law will lead to state-supported speech drowning out other speech. These arguments fail to meet petitioners' formidable burden in asking this Court to throw out a state law that increases speech.

A. *Davis* Does Not Compel Invalidation.

Petitioners first argue that this Court's decision in *Davis* compels invalidation because Arizona's public finance system is constitutionally indistinguishable from the provision at issue in *Davis*. (McComish Br. 47; Arizona Free Enterprise Club's Freedom Club PAC ("Freedom Club PAC") Br. 28.) Petitioners argue that the law's use of triggers for matching funds renders Arizona's law constitutionally infirm, relying on this Court's recent decision in *Davis*, 554 U.S. 724. Petitioners' reliance on *Davis* is misplaced.

In *Davis*, this Court struck down the so-called "Millionaire's Amendment" to the Bipartisan Campaign Reform Act, which effectively trebled the contribution limits on Congressional candidates running opposite self-financed millionaires. In striking down the statute as violating the free speech protections of the First Amendment, this Court distinguished the Millionaire's Amendment from the public financing regime approved in *Buckley*. "[A] candidate . . . has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits. The choice imposed by [the Millionaire's Amendment] is not remotely parallel to that in *Buckley*." *Id.* at 740. In other words, as petitioners recognize (*see* McComish Br. 48), the Millionaire's Amendment was faulted for its "discriminatory contribution limits," *Davis*, 554 U.S. at 740, a feature present neither in the public financing options in *Buckley* nor here.

That distinctive feature of the Millionaire's Amendment – contribution limits – is what made it an impermissible burden on speech. Arizona's law is different: it finances, rather than limits, campaign speech, and it thus promotes, rather than burdens, First Amendment values. *See, e.g.*, *The Supreme Court*, 122 Harv. L. Rev. at 384 (noting the "clear doctrinal line between the asymmetrical restriction scheme in *Davis* and the asymmetrical funding schemes in many states"). The fact that Arizona's law finances only some candidates – i.e., those who give up private financing – is not a cognizable "burden" or "penalty" on speech any more than was the denial of tax-deductible status to lobbyist-nonprofits in *Regan*; nor is it meaningfully different than the refusal to subsidize certain types of art at issue in *Finley*. The law is "not aimed at the suppression of dangerous ideas," *Regan*, 461 U.S. at 550 (internal quotation marks and citation omitted), nor does it penalize "disfavored viewpoints," *Finley*, 524 U.S. at 587.

To be sure, if the government subsidies were "manipulated" to have a "coercive effect," the law might be constitutionally suspect. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting); *see also Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints."). But that is not the case here. Because candidates of all walks of life and political persuasions are permitted to participate in Arizona's public finance program, the law does not impermissibly penalize speech.

The fact that the amount of public financing varies according to the actual dynamic in the particular race does not change the underlying constitutional principle, or "penalize" anybody. The only "penalty" is the burden of enduring more speech in the public square, but such an injury is not constitutionally cognizable and surely not a valid First Amendment concern.

Davis is readily distinguishable for another reason as well. The provision at issue in *Davis* distinguished between speakers – candidates – on the basis of whether they self-financed or raised money from other sources. This discrimination among speakers for contribution limits was not constitutionally valid because there was no permissible reason for distinguishing between the two types of privately financed candidates. Here, the Arizona law is entirely agnostic on the source of the privately funded speaker's funds. The Arizona law is concerned only with ensuring that its public finance system is viable and that it has some flexibility to address the "on-the-ground" dynamic; it does not distinguish among speakers based on the source of their funds.

B. The Arizona Law Does Not Force Any Speaker To Bear Another Speaker's Speech.

Petitioners also theorize that Arizona's matching-funds provisions impermissibly burden their speech by forcing them to bear speech from their competitors. (McComish Br. 58-61; Freedom Club PAC Br. 32-35.) But the precedents on which petitioners rely concern

risks not present here – specifically, the risks that their audience might attribute opposing points of view to them, and that they may be forced to bear a message with which they disagree. In contrast, the law here is alleged only to affect the amount of the other speaker's speech, and petitioners' cases therefore do not apply.

For example, petitioners argue that Arizona's law chills speech in the same way as the law found to be unconstitutional in *Pacific Gas & Electric Co.*, 475 U.S. 1. In *PG&E*, this Court found an infringement on a utility company's First Amendment rights when a public commission ordered the utility to insert a newsletter from a third party – a group called Toward Utility Rate Normalization ("TURN") – in its billing envelope. The Court concluded that PG&E's rights were infringed by "[t]he Commission's order forc[ing] appellant to disseminate TURN's speech in envelopes that appellant owns and that bear appellant's return address. Such forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent." *Id.* at 18.

No such risk is present here. Petitioners seize on the purported similarity of the triggering mechanism for opposing speech: in *PG&E*, the utility's decision to speak in its newsletter triggered a corresponding right to speak in the same newsletter by TURN, whose interests were in opposition to the utility's; here, raising or spending certain amounts of money in connection with a political campaign triggers funding of an opposing candidate. But this triggering

mechanism – by itself – was not the critical defect in the order scrutinized in *PG&E*. Rather, it was the requirement that the utility present views with which it disagreed *in its own mailings* – making it a "forced association with potentially hostile views." *Id.* Arizona's matching-funds provision does not associate traditional candidates with opposing speech at all – if anything, the resulting expansion of political speech would likely expand the candidates' opportunities to elucidate their views and distinguish them from those of their opponents. That result is entirely consistent with First Amendment principles; indeed, as the Court cautioned in *PG&E* itself, there exists no right to speak "free from vigorous debate." *Id.* at 14.

Similarly unavailing is petitioners' reliance on *Miami Herald Co. v. Tornillo*, 418 U.S. 241. In *Tornillo*, the Court considered a Florida statute that required newspapers that attack the character of a political candidate to afford free newspaper space for a reply. The Court held that the law violated the First Amendment guarantee of a free press. Its chief concern was that the law "exacts a penalty on the basis of the content of a newspaper" – a penalty that operates both in terms of economic cost to the newspaper and, more importantly, as a restraint on "editorial control and judgment." *Id.* at 256–58. Again, Arizona's law does nothing like this; it finances some candidates in response to fundraising or expenditures by others; but it does not purport to require privately financed candidates to transmit any message *on behalf of* opposing candidates. It thus threatens neither to expend their resources nor to

force them to carry a message with which they disagree.

C. The Arizona Law Does Not Lead To Self-Censorship.

Petitioners alternatively argue that Arizona's law "chills" their speech because the knowledge that expenditures beyond a certain point will cause funding of their rivals causes them to avoid speaking beyond that point – which they argue is akin to self-imposed censorship. (McComish Br. 48-49; Freedom Club PAC Br. 33.) Petitioners claim that this theory was adopted by the Eighth Circuit decision in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), and implicitly approved by this Court when it cited *Day* in *Davis*. This theory, too, is wrong. This Court has never adopted *Day*, and the reasoning of the decision is flawed.

Day held that a matching-funds provision with some similarities to the one at issue here impermissibly chilled supporters from making campaign contributions because such contributions had the effect of increasing the funding of and raising the expenditure limits on public financed candidates. *Id.* at 1359-60. *Day* relied on *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), in reaching its conclusion. But *Lakewood* was concerned about an entirely different sort of chilling effect. In that case, the City of Lakewood vested unfettered discretion in its mayor to grant or deny permits to place news racks on city sidewalks. The Court's concern was that the lack of standards and transparency in the system would cause newspapers to refrain

from engaging in anti-mayoral speech – out of fear that the mayor could retaliate by denying permits in an effectively unreviewable decision. *Id.* at 760 (upholding facial challenge because "without standards to bound the licensor, speakers denied a license will have no way of proving that the decision was unconstitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor's unreviewable preference").

Lakewood's logic simply does not translate here. Arizona's law threatens no governmental restraint on speech in retaliation for speaking. If candidates or their supporters are "chilled," it is only by the prospect that their opponents may add their views to the marketplace of ideas. As other courts have noted, "the chilling effect alleged by [petitioners] is different in kind because it stems not from any fear of direct government censorship but rather from the realization that one group's speech will enable another to speak in response. In stark contrast to the licensing scheme challenged in *Lakewood* . . . matching funds is likely to result in more, not less, speech." *N.C. Right to Life Comm'n Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437–38 (4th Cir. 2008). In similar fashion, the First Circuit found that a similar "public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures." *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000). The same is true here. Because Arizona's matching fund provisions only promotes more speech, and in no way limits the quantum or

content of speech engaged in by traditional candidates, it must be upheld.

D. The Arizona Law Does Not Lead Some Speech To Overwhelm Other Speech.

Petitioners finally suggest that Arizona's matching-funds provision – by expanding political speech – somehow threatens to inhibit or drown out the speech of others. (*See* Freedom Club PAC Br. 30-32.) But this Court has never accepted the "drown out" theory as a basis for restricting speech. *See, e.g.*, *Buckley*, 424 U.S. at 48–49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."). The Court should likewise reject it now.

The Arizona law is carefully calibrated to ensure that publicly financed candidates have a viable opportunity to compete. Petitioners have not remotely established that the publicly financed candidates will drown out privately financed candidates, nor could they. While the First Amendment surely protects the rights of all candidates to engage in political speech, the protection does not extend so far as to prevent their speech from being subject to a response. Privately financed candidates in Arizona remain free to spend as much money on elections as they see fit.

CONCLUSION

For the foregoing reasons, and those stated by Respondents, the judgment of the Court of Appeals should be upheld.

Respectfully submitted,

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